IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28-06-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE M. JAICHANDREN

O.S.A.NO.103 OF 2001

Dr.A. Ravikumar .. Appellant/Plaintiff

Vs.

1. M. Savithiri
2. A. Sashikumar
3. A. Arunkumar
4. Jayam Chandran
5. S. Senthil Kumar
6. S. Premkumar
   (Declared major as per
   order dt.28.6.2006
   in CMP.No.12382/05)
7. Poornaswari Srinivasan .. Respondents/defendants

Appeal filed under Order 36 Rule 1 read with Clause 15 of the Letters Patent against the judgment of the learned single Judge dated 30.1.2001 in T.O.S.No.28 of 1999.

For Appellant : Mr.T.V. Ramanujam
Senior Advocate for
Mr.T.V. Krishnamachari

For Respondents 1 to3: Mr.P.B. Sampath Kumar
and 5 to 7

Respondent-4 : Mr.P. Sundaramurthy

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J U D G M E N T

P.K. MISRA, J

For convenience, the parties are referred to as they are described in this Appeal.

The present appeal has been filed against the judgment of the learned single Judge in T.O.S.No.28 of 1999, rejecting the application of the present appellant for issuance of probate in respect of the Will dated 8.4.1993, purportedly executed by one P.G. Arunachalam.

2. Admittedly, late Arunachalam through the first wife had one son late A. Srinivasan and one daughter, Respondent No.4. Two sons and widow of late A. Srinivasan are the Respondents 5 to 7. After the death of the first wife, the aforesaid Arunachalam had married Respondent No.1. Through Respondent No.1, there are three sons, the present Appellant and Respondent Nos.2 and 3.

3. The appellant claims that Arunchalam executed a Will dated 8.4.1993 whereunder the disputed property and movables and cash deposits, etc., were bequeathed in favour of the appellant, Respondents 1 and 2 and the present appellant was appointed as the Executor of the Will. After the death of Arunachalam on 26.11.1998, the present appellant filed O.P.No.351 of 1999 corresponding to T.O.S.No.28 of 1999 for grant of probate.

4. In the said proceedings, a written statement was filed by the Respondent No.4, who had been arrayed as Defendant No.4, opposing the grant of probate. No objection had been filed on behalf of the legal heirs of pre-deceased son, namely, the Respondents 5, 6 and 7 as well as the second wife of the testator, namely, Respondent No.1. In the written statement filed by Respondent No.4 it was indicated that the alleged Will had been created by using some signatures of the testator on a piece of blank paper and the testator would not have written such a Will leaving his only daughter out of the Will. It was further indicated that the testator had constructed the disputed house property by utilising the gold jewels belonging to the mother of the Respondent No.4 and therefore she has a share in the property. It was further indicated that the testator had told her that all the properties would be equally divided among the legal heirs including the objector. It was further stated that during the year 1993 she had visited her father on many occasions, but her father had not uttered a single word about the alleged Will. It was further stated that in the Will reference had been made to several promissory notes, National Savings Certificates, Shares, Fixed Deposits, etc., but in

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the affidavit of assets, the petitioner (present Appellant) had disclosed only about the house property and had not disclosed about the movable properties which "... shows that the petitioner and the respondents 1 to 3 appeared to have hand in glove and secreted all those movable properties by fraudulently obtaining signature from her father. This defendant and defendant 5 and 6 were left out of those property also". It was further stated that the Will was not executed in sound and disposing state of mind by the testator and it was fraudulently brought about by the appellant to defeat the lawful share of Respondent No.4 and the Respondents 5 to 7.

5. In the proceedings, the appellant was examined as P.W.1 and one of the attesting witnesses was examined as P.W.2 and one Doctor was examined as P.W.3. On behalf of the contesting defendant, she herself was examined as D.W.1 and the sister of the testator was examined as D.W.2.

6. The trial court framed the following issues :-

"1. Whether the Will dated 8.4.1993 was executed by the testator while in a sound and disposing state of mind ?

2. Whether the petitioner is entitled to get probate of the Will ?

3. To what relief ?"

7. The trial court while discussing all the issues together, came to the conclusion that the Will cannot be held to be valid, true and a genuine document.

The present appeal is against such conclusion of the learned single Judge.

8. The learned single Judge discarded the Will mainly on the following reasonings :-

(1) In the Will, names of the family members or the legal heirs of the executant, except the three beneficiaries, namely, the three sons through the second wife, had not been indicated.

(2) No provision had been made even for the maintenance of the wife and there was no reason to exclude other legal heirs, including the second wife and the daughter out of the Will.

(3) Even though there was no other immovable property, the recital in the Will indicates that all other movable and immovable properties had been bequeathed in favour of three sons.

(4) Evidence of the attesting witness regarding execution was not acceptable.

(5) Copy of the Will, which was served on the counsel for the defendant No.4 would indicate that such copy was not the xerox copy of the Will produced and proved in the Court.

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On the basis of the aforesaid reasonings, the learned single Judge held that the plaintiff had not properly proved the execution or attestation of the Will and it is shrouded with all possible circumstances and doubts.

9. Exclusion of the second wife and the daughter through first wife and the legal heirs of the pre-deceased son through the first wife has been considered to be one of the most suspicious circumstances by the trial court.

It is apparent from the records that apart from Respondent No.4, who objected, the other respondents had no objection to the probate being granted. Respondents 5 to 7, who are legal heirs of the pre-deceased son of the testator through the first wife, and Respondent No.1, the second wife of testator, have all appeared through Advocate and have supported the stand of the present appellant.

10. The evidence on record clearly indicates that after the death of the first wife, the testator married the second wife, Respondent No.1, through whom he had begotten the present appellant and Respondent Nos.2 and 3, the three beneficiaries under the Will. The other heirs, including the second wife, who is the mother of the three beneficiaries, have given consent affidavits. The mere fact that all other legal heirs have been excluded, including the second wife, in the peculiar facts and circumstances of the case, cannot be considered as a suspicious circumstance, particularly when the consent affidavits have been filed on their behalf. Making no provision for the maintenance of the second wife is also of no consequence as her three sons are the beneficiaries.

11. So far as Respondent No.4 is concerned, there is some material on record to indicate that the relationship between her and her father was strained. It is the admitted case that after the death of the first wife, the testator married for the second time and, at that stage, Respondent No.4, who was very young, lived with her maternal grandmother. Ex.P.7 is the letter written by Respondent No.4 to her father at the time of her marriage. The contents of the said letter are extracted hereunder :-

> "Dear father,
>
> you know about my marriage proposal. The marriage date is July 10th. I would like to meet you once before my marriage. Not for anything else. Just to get your blessings. I would have come and met you in your residence. But I do not know how you will react to it. Already I had an unpleasant experience. So I did not want to take the same risk again. Aunt told me that you never want to see me and take part in the marriage. I hope

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atleast you will extend you blessings to me on that day. I would like to meet you at your school if you have no objection. Hope you are still in Saidapet Corpn. High School. If you have no objection in meeting me please write to me. I will be more happy if you attend to my marriage. Please reply me.

Your daughter,
Jayam "

12. From the aforesaid letter it is apparent that relationship between the two was far from cordial. If the relationship was normal, there would not have been any occasion for the daughter to seek for the permission of the father to meet him and to seek for his blessings. Even the recital indicates that the daughter was not aware whether her father was still continuing in Saidapet Corporation High School. It is of course true that after the marriage, the testator had given money to the daughter on a few occasions, but it cannot be assumed that the relationship between the daughter and the father had become normal. The fact that the daughter was brought up by her maternal grandmother itself suggests that the relationship become very strained after the second marriage of the father. Keeping in view such a background, the fact that under the Will a house property has been given to three sons, not giving any property to the daughter through the first wife or the other legal representatives of the pre-deceased son through the first wife, cannot be considered to be a suspicious circumstance.

13. The burden to prove that the Will had been duly executed was obviously on the propounder. For the aforesaid purpose, the propounder has examined P.W.2., who is an attesting witness. The statement of such P.W.2, who was a fairly senior official in the State Bank of India, shows that he was requested by the testator to attest the Will on 10.4.1993. At the time of execution of the Will, the testator, P.W.2 and another attesting witness were present. According to the evidence of P.W.2, at the time of execution of the Will, the testator was in good health and sound mind. He has stated that two attesting witnesses were present when the testator had signed the Will and they had also attested in the presence of the testator.

14. Learned single Judge has discarded the evidence of such witness on the ground that the attesting witness who was working in Kancheepuram was normally leaving at 7.00 a.m and returning after 7.30 p.m and he could not have attested the document at about 10.30 a.m on 8.4.1993, which was apparently a working day.

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15. It is of course true that 8.4.1993 was a working day. In cross-examination, however, the contesting Respondent No.4 had not put any question to the effect that the witness had gone to the bank at Kancheepuram on 8.4.1993. If it was the case of the Respondent No.4 that P.W.2 had actually attended the bank on 8.4.1993 and therefore he could not have attested the document at 10.30 a.m on 8.4.1993, the Respondent No.4 should have put specific question on that aspect. Merely because it was elicited that normally the witness used to leave for Kancheepuram at 7.00 a.m and return back after 7.30 p.m, cannot be taken to an admission of the witness that on 8.4.1993 at 10.30 a.m he was not present at Chennai. If the Respondent No.4 wanted to prove that the witness was present at the bank in Kancheepuram at 10.30 am on 8.4.1993, she could have produced materials in support of such case. A perusal of the evidence of P.W.2 indicates that there is no earthly reason as to why such witness would blindly support the plaintiff. P.W.2 was a neighbour of the testator and his evidence appears to be natural. He has denied the suggestion that the signature of the testator was obtained on a blank paper and subsequently it was filled up to make it as a Will. No suggestion has been given as to why P.W.2 would collude with the propounder.

16. Learned single Judge has referred to the fact that in the copy of the Will furnished to Respondent No.4, which has been subsequently marked as Ex.D-1, in the first page of the Will the address of the two attesting witnesses had not been furnished below the signature of the two attesting witnesses, even though it was so furnished on the last page of such Ex.D-1 and it has been furnished in both the pages of Ex.P-1, the Will which has been produced and proved by the plaintiff.

17. An application has been filed by the appellant to produce the original of Ex.D-1. No serious objection has been raised for considering such document nor it is disputed that Ex.D-1, which was furnished to Respondent No.4, was a copy of such document. A comparison of Ex.D-1 along with Ex.P-1 clearly indicates that two copies of the Will had been typed out and in fact both the copies had been signed by the testator and the attesting witnesses. The Will which has been produced and proved is the Will prepared by carbon process, an exact copy of the other document which has been now produced. Merely because there is some omission to indicate the address of the attesting witnesses in the first page of such document, which was already executed by the executant and attested by the attesting witnesses, no suspicion can be raised against the due execution of the Will. There is no difference whatsoever between the two documents, save and except the fact that in one document the address of the attesting witnesses has been furnished

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in both the pages, whereas in the other document the address has been furnished only at the end of the second page and not in the first page.

18. A faint plea has been raised regarding the sound disposing state of mind of the testator at the time of execution of the Will. However, there is no material produced on behalf of Respondent No.4 to raise any suspicion regarding the physical as well as mental health of the testator at the time when the Will was executed. On the other hand, P.W.3 is a Doctor, who has stated that in 1993 the testator was in good health.

19. Respondent No.4 had examined D.W.2., the sister of the testator, who has stated that her brother had not informed her about the execution of the Will. Merely because the testator had not indicated about the execution of the Will to his sister or even to other members including the daughter, such circumstance cannot be considered as a ground to discard the Will, when execution of such Will has been proved through independent witness.

20. Respondent No.4, who has been examined as D.W.1, has stated in evidence that the signature found in Ex.P-1 Will does not appear to be that of her father. However, it is to be noticed that in the written statement, she had not taken such a plea. On the other hand, her plea was that a piece of paper containing the signature of her father was converted into a Will. Even this allegation in the written statement can be held to be disproved by the fact that in fact the proved Will Ex.P-1 consists of two pages, wherein the testator had signed in both the pages and similarly the other document of which Ex.P-1 was a carbon copy has also been signed in two places. In such view of the matter, there is no question of "utilising a piece of paper containing the signature".

21. In a Division Bench decision of this Court reported in 2001(3) CTC 283 (CORRA VEDACHALAM CHETTY v. G. JANAKIRAMAN) it had been observed :-

> "25. The testamentary Court is a Court of conscience. It is not a Court of suspicion. It is not the law that, whenever a Will is sought to be proved in the Court, the Court should start with the presumption that the Will is not genuine, that it is fraudulent and that the person who chooses to probate the Will must remove all such suspicions even they are not unreal. The object of the probate proceedings is not to render the testamentary document ineffective but to make it effective and render the terms of that Will operative. In doing so, the Court has to take note of the fact that the testator is not available to the Court to state as to whether the document

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in fact was his or her last Will or as to whether he or she had signed the same and whether the attestors had signed receiving an acknowledgment from him about the execution of the Will. It is for that reason that the Courts should be cautious while dealing with the evidence placed before them in relation to the executions and attestation, of the Will as also the disposing state of mind of the testator."

22. Keeping in view the aforesaid aspects, in the absence of any grave suspicious circumstance and particularly keeping in view the evidence of P.W.2., in our opinion, the conclusion of the learned single Judge that the Will had not been executed and there is suspicious circumstance cannot be sustained. The appeal is therefore allowed and probate shall be granted to the appellant. There is no order as to costs.

dpk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Deputy Registrar,
Original Side,
High Court, Madras. (For probate)

2. The Sub Asst Registrar,
Original Side,
High Court, Madras.

+ 1 cc to Mr.R. Sundaramurty, Advocate SR No.27600
+ 1 cc to Mr.T.V. Krishnamachari, Advocate SR No.27547

TEJ(CO)
SR/11.7.2006

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